Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

STEVEN SCOTT BADER,

Petitioner,

v.

STATE OF ARKANSAS,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Arkansas

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

PEREMPTORY STRIKES DURING VOIR DIRE SHOULD BE CATEGORICALLY ABOLISHED. THE TRIAL COURT ERRED WHEN IT REFUSED TO HOLD THAT THE ARKANSAS PEREMPTORY STRIKE STATUTE IS FACIALLY UNCONSTITUTIONAL, BECAUSE IT VIOLATES THE PETITIONER'S FEDERAL SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO A FAIR AND IMPARTIAL JURY, AND BECAUSE IT VIOLATES THE POTENTIAL JUROR'S FEDERAL FOURTEENTH AMENDMENT RIGHT TO EQUAL PROTECTION OF THE LAW BY PREVENTING HIM FROM SERVING JURY DUTY, WITHOUT A SHOWING OF SUFFICIENT CAUSE TO STRIKE HIM FROM THE PANEL.

PARTIES

Parties to the proceeding below are the petitioner, Steven Scott Bader, and the respondent, the State of Arkansas.

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PETITION FOR WRIT OF CERTIORARI

Steven Scott Bader respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Supreme Court of the State of Arkansas, entered in the above-entitled proceeding on March 22, 2001.

OPINION BELOW

The opinion of the Supreme Court of Arkansas is reported at 344 Ark. 241, 40 S.W.3d 738 (2001). This opinion is reproduced in the appendix herein, p. 1a.

JURISDICTION

The judgment of the Supreme Court of Arkansas was entered on March 22, 2001. The jurisdiction of the Supreme Court is invoked under 28 U.S.C. Sec. 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

SIXTH AMENDMENT

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for

obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

FOURTEENTH AMENDMENT, SECTION ONE

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

INTRODUCTION

This case presents Sixth and Fourteenth Amendment challenges to the Arkansas peremptory strike statute, A.C.A. Sec. 16-33-305, as violative of the Petitioner's right to an impartial jury and fair cross-section of the community and, by way of third-party standing, of the potential juror's right to equal protection of the law.

STATEMENT OF THE CASE

This is a petition for a writ of certiorari, brought by Steven Scott Bader, in which he asks this Court to review the decision of the Arkansas Supreme Court in *Bader v. State*, 344 Ark. 241, 40 S.W.3d 738 (2001).

On April 12, 1998, individuals broke into the home of a 72-year-old man and beat him severely. The victim was hospitalized, and the State charged Diana Martens and the Petitioner, Steven Scott Bader, with Battery in the First Degree. The victim remained in the hospital until his death on May 9, 2000, from a complication of the injuries by a systemic infection which he may have contracted during the hospitalization. After his death, the State charged Diana Martens and the Petitioner with Murder in the First Degree.

The Petitioner went on trial for the murder charge on September 20, 1999. The Petitioner brought a pretrial motion, asking the trial court to hold the Arkansas peremptory strike statute (A.C.A. Sec. 16-33-305) unconstitutional because the statute allows both sides to strike jurors for unlawful reasons, thus denying potential jurors' right to equal protection. The trial court denied the Petitioner's motion.

The trial lasted three days, after which the jury found the Petitioner guilty of Murder in the First Degree and sentenced him to forty years in the Arkansas Department of Correction. The Petitioner brought an appeal from that verdict to the Arkansas Supreme Court and there argued three points for reversal. The Arkansas Supreme Court, after oral argument, denied the appeal on March 22, 2001.

The Petitioner now brings this Petition for Writ of Certiorari, based on one of the issues presented to the Arkansas Supreme Court – namely, that the trial court erred when it refused to hold that the Arkansas peremptory strike statute is facially unconstitutional, because it violates the Petitioner's federal Sixth and Fourteenth

Amendment rights to a fair and impartial jury and a cross-section of the community, and because it violates the potential juror's federal Fourteenth Amendment right to equal protection of the law.

REASON FOR GRANTING A WRIT OF CERTIORARI

PEREMPTORY STRIKES DURING VOIR DIRE SHOULD BE CATEGORICALLY ABOLISHED. THE TRIAL COURT ERRED WHEN IT REFUSED TO HOLD THAT THE ARKANSAS PEREMPTORY STRIKE STATUTE IS FACIALLY UNCONSTITUTIONAL, BECAUSE IT VIOLATES THE PETITIONER'S FEDERAL SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO A FAIR AND IMPARTIAL JURY, AND BECAUSE IT VIOLATES THE POTENTIAL JUROR'S FEDERAL FOURTEENTH AMENDMENT RIGHT TO EQUAL PROTECTION OF THE LAW BY PREVENTING HIM FROM SERVING JURY DUTY, WITHOUT A SHOWING OF SUFFICIENT CAUSE TO STRIKE HIM FROM THE PANEL.

I. INTRODUCTION

The Petitioner challenges the Arkansas peremptory strike statute, A.C.A. Sec. 16-33-305, as facially unconstitutional under the United States Constitution's Sixth and Fourteenth Amendment rights to an impartial jury and fair cross-section of the community and the potential juror's Fourteenth Amendment right to equal protection of the law. Supreme Court case law in this area is limited, and jurisdictions throughout the nation's courts are in conflict as to which positions, with regard to the use of peremptory strikes as outlined in *Batson v. Kentucky*, 476 U.S. 79 (1986), are constitutionally permissible. The

United States Supreme Court has not yet directly addressed the question of whether peremptory strike statutes are unconstitutional; thus, Petitioner's issue is one of first impression with the Supreme Court.

While there is authority in conflict with the Petitioner's position, there is also both precedent and significant authority in support of Petitioner's position, arguing for the elimination of the peremptory challenge. The Petitioner posits that while the Court can find a basis in law to hold for either the Petitioner or the Respondent State of Arkansas, the policy reasons supporting the Petitioner's position clearly outweigh those supporting the Respondent's position. (Motion raised in the trial court on this issue is reproduced in the Appendix, p. 25a; the transcript of the trial court's denial is reproduced in the Appendix, pp. 13a-15a).

A short synopsis of the cases Petitioner considers important in the development of the peremptory challenge is given below:

> *Swain v. Alabama,* 380 U.S. 202 (1965): Prosecutor may not engage in purposeful racial discrimination in the use of peremptory challenges. However, the defendant must prove equal protection violation by showing discrimination not only in the defendant's case, but that prosecutor had a systematic pattern of discrimination in other cases.
>
> *Batson v. Kentucky,* 476 U.S. 79 (1986): Defendant can prove racial discrimination in the use of peremptory challenges on equal protection grounds under the Fourteenth Amendment using his case alone, if he is of the same cognizable class as the struck juror and the prosecutor

is not able to give a racially neutral reason for striking the juror.

Powers v. Ohio, 499 U.S. 400 (1991): Defendant can make a *Batson* challenge of a juror of a cognizable group of which he is not a member on Fourteenth Amendment equal protection grounds, by way of third party standing.

Edmonson v. Leesville Concrete Co., 500 U.S. 614 (1991): *Batson* applied to civil cases.

Georgia v. McCollum, 505 U.S. 42 (1992): Criminal defendant prohibited from using discriminatory peremptory challenges.

J.E.B. v. Alabama, 511 U.S. 127 (1994): *Batson* made applicable to gender.

Purkett v. Elem, 514 U.S. 765 (1995): *Batson* test modified by holding that the trial court may accept an "implausible or fantastic justification" for a peremptory strike and the reason will suffice as long as the reason is race-neutral.

A. Batson Criticism

In *Batson v. Kentucky, supra,* the U.S. Supreme Court found that *Swain v. Alabama, supra,* had placed a "crippling burden of proof" on a defendant with its requirements for a *prima facie* case of a discriminatory peremptory challenge. In its place the Court outlined what it perceived to be a more reasonable test for the defendant. After the case was handed down and the *Batson* test was being applied in both federal and state courts on a regular basis, a growing criticism of the *Batson* peremptory test emerged.

The greatest criticism of *Batson* has come from the fact, on which there is general agreement, that *Batson* has failed in eliminating the discriminatory use of the peremptory against "undesirable" potential jurors. This is particularly true since *Purkett v. Elem, supra,* was handed down, where the Supreme Court held that even an "implausible or fantastic justification" for a peremptory strike could be upheld as long as it was racially neutral.

According to one constitutional law scholar, "The *Batson* test is little more that a test of the prosecutor's creativity. . . . To date . . . *Batson* has offered only 'vain and illusory' protection in a court of law." Joshua E. Swift, *Batson's Invidious Legacy,* 78 Cornell L. Rev. 336 (1993). In the words of another, "The important goal of *Batson* – to achieve the end of discrimination in jury selection – has not been accomplished. That aspiration is too important to be conceded in favor of a current system that perpetuates discrimination." Jere W. Morehead, *When a Peremptory Challenge is No Longer Peremptory: Batson's Unfortunate Failure To Eradicate Invidious Discrimination From Jury Selection,* 43 DePaul L. Rev. 625 (1994). And see also: Leonard L. Cavise, *The Batson Doctrine: The Supreme Court's Utter Failure To Meet the Challenge of Discrimination in Jury Selection,* 1999 Wis. L. Rev. 501 (1999).

A second criticism of *Batson* is that various courts have reached conflicting results in the process of interpreting *Batson.* Inconsistent standards mean prospective jurors face inconsistent levels of protection for their right to serve on a jury and litigants face inconsistent protection for their right to an impartial jury chosen in a non-discriminatory manner.

In some circuits, many of these reasons offered to support a peremptory strike are held to be pretextual while in other jurisdictions they are considered to be unimpeachable. In addition, one circuit holds a prosecutor's race-neutral reasons pretextual if the prosecutor fails to strike potential jurors who have the same traits or qualities as stricken jurors. In other circuits, such a disparity is not dispositive of the issue.

Some circuits uphold challenges based on vague assurances from the attorney that the background of the venire member is objectionable. However, the Eighth Circuit has held the very same reasons pretextual. [Cites omitted.] Swift, *Batson's Invidious Legacy, supra.*

The court in *Minetos v. City University of New York,* 925 F. Supp. 177 (S.D.N.Y. 1996) makes this same point with an extensive list of examples from various jurisdictions, e.g., *United States v. Tucker,* 836 F.2d 334 (7th cir. 1988) (striking all African-American venire persons for Lack of education and business experience was not pretextual); but cf., *Garret v. Morris,* 815 F.2d 509 (8th Cir.) (striking all African-American venire persons for lack of education and knowledge was pretextual), *cert. denied,* 484 U.S. 898 (1987).

A third and related criticism is the difficulty faced by judges in applying the *Batson* test. First,

> A judge must ask an attorney for a race-neutral explanation, but once the attorney offers such a reason – whether based on intuition or not – the judge must accept it as long as it does not appear discriminatory on its face. Federal courts

> have struggled unsuccessfully to apply this amorphous and confusing test.

Swift, *Batson's Invidious Legacy, supra.* And:

> Problems arise because attorneys are experts at developing facially neutral explanations for peremptory challenges, true or not, and courts are required to determine if those reasons are pretexts for discrimination.

Patricia J. Griffin, *Jumping on the Ban Wagon,* 81 Minn. L. Rev. 1237 (1991).

In *Minetos, supra,* the trial court points out that in an effort to assist the trial courts in applying the *Batson* test, the New York Appellate Courts had drawn up guidelines. Under the guidelines, certain reasons for striking jurors, offered in response to a *Batson* challenge, will be presumed pretextual on their face and certain reasons will be presumed not pretextual. However, as the court in *Minetos* points out, this guide has the unfortunate effect of creating a how-to guide for defeating *Batson* challenges.

There has been a continuing growth of accepted race-neutral explanations for a *Batson* strike. For example, the following reasons have all been acceptable to support a strike; education, employment, residence, language, marital status, criminal history, appearance, youth, age, demeanor, and religion [Cites omitted.] Jon Sands and Robyn Varco, *Peremptories and Prejudice,* The Champion, August 1999, Vol. XXIII, No. 7. The continuing expansion and acceptance of such reasons will ultimately result in the impossibility, for all practical purposes, of prevailing in a *Batson* challenge. *See* Swift, *Batson's Invidious Legacy,*

supra, where in a recent study, only three of seventy-six challenges in federal courts were successful.

It is evident that if a litigant looks long enough, there is no impediment to developing a race-neutral reason that will withstand a *Batson* challenge.

B. Eliminating the Peremptory Challenge-Background

Along with criticism of *Batson*, and perhaps because of the failure of *Batson*, there has been a growing criticism of the peremptory challenge itself and a call for its abolition. While the call for the elimination of the peremptory has come primarily from commentators, there has also been a response from the judiciary. The primary reasons in support of the elimination of peremptories are: 1) they do not work and are therefore ineffective in producing an impartial jury; 2) they hinder the selection of a truly impartial jury and a true, fair cross-section of the community, thus denying a criminal defendant such as the Petitioner the very right which the Sixth Amendment was designed to protect; and 3) they are used very successfully as a pretext for discriminatory purposes in eliminating an undesired race or gender, thus violating the potential juror's right to equal protection of the law. The primary suggestion as an alternative to the peremptory is an expanded system of challenge for cause. *See*, e.g., Roger Hochman, *Abolishing the Peremptory Challenge*, 17 Nova L. Rev. 1367 (1993).

While the historical roots of peremptories lie in early England, the first peremptory strikes were never intended for the use to which they are put today in

modern American state and federal courts. Originally, in England, the peremptories were granted to the defendant in order to give at least the appearance of fairness where the crown picked the jury pool and had unlimited peremptory strikes, to boot. Morris B. Hoffman, *Peremptory Challenges Should Be Abolished: A Trial Judge's Perspective*, 65 U. Chi. L. Rev. 809 (1997). Hoffman goes on to say:

> The peremptory challenge has nothing whatever to do with the commitment to a broad cross-section and in fact it threatens to render that commitment hollow. Nor does it have much to do with the task of rationally and honestly separating partial jurors from impartial jurors. *It is a true historical remnant: not only a quaint vestigial tail on the royal prerogative, but perhaps also a dangerous appendix waiting to burst in the gut of the Sixth Amendment.* (Emphasis added.)

It is interesting to note that the peremptory has by now been abolished in England. Neil Vidmar, *The Common Law Jury* 62 SPG Law & Contemp. Probs. 1 (1999). On this point it should also be noted that it is well recognized by the Supreme Court that there is no constitutional right to peremptory challenges, as Justice Marshall pointed out in his concurrence in *Batson*:

> This court has also repeatedly stated that the right of the peremptory challenge is not of constitutional magnitude, and may be withheld altogether without impairing the constitutional guarantee of impartial jury and fair trial. Citing *Frazier v. United States*, 335 U.S. 497 (1948); *United States v. Wood*, 299 U.S. 123 (1936); and *Stilson v. United States*, 250 U.S. 583 (1919).

Justice Burger has even observed that it is "quite probable" that *Batson* protection will extend to so many classifications that the peremptory challenge will "collapse into the challenge for cause." *Batson v. Kentucky, supra.* (Burger, J., dissenting).

Although there has also been discussion on the matter of alternate solutions to that of banning perempotries – some manner of "retooling" the *Batson* test – the authorities generally conclude that there is no workable solution because of the very nature of the problem presented within the *Batson* question, and therefore, the only reasonable and workable solution is to eliminate peremptory strikes. *See,* e.g., Griffin, *Jumping on the Ban Wagon, supra.*

II. APPLYING THE TESTS FOR CONSTITUTIONALITY

A. Sixth Amendment: The Challenged Statute Does Not Pass Strict Scrutiny

The right to an impartial jury under the Sixth and Fourteenth Amendments is a fundamental right. *Parker v. Gladden,* 385 U.S. 363 (1966). Fundamental rights are subject to strict scrutiny which requires that the challenged statute must further a compelling state interest and must be narrowly tailored to meet that interest. *Reno v. Flores,* 507 U.S 293 (1993). The Arkansas peremptory statute does not pass this test.

Although the stated purpose of peremptories – to insure impartial juries – is a compelling state interest, the Petitioner argues that the statute is not narrowly tailored to meet that objective. Additionally, the Petitioner argues

that peremptories don't further the end of selecting an impartial jury, because there is no correlation between the litigant's "hunch" about a juror's viewpoint and the reality of a struck juror's viewpoint. The statute is not narrowly tailored, therefore, because it is overly inclusive, including struck jurors who have no bias.

Commentators agree that the peremptory challenge is ineffective in ferreting out the biased juror. *See*, e.g., two studies discussed in: Carol A. Chase and Colleen P. Graffy, *A Challenge for Cause Against Peremptory Challenges*, 19 Loy. S. A. Int'l & Comp. L. J. 507 (1997). One study showed that when defense attorneys exercised their peremptory strikes, the conviction rate was actually seven percent higher than when they did not do so. Another had the peremptorily struck jurors remain in the courtroom as "shadow jurors" who voted at the end of the trial with the same proportion of guilty votes as the actual jurors in the case.

Another study indicated that there is little benefit from the use of peremptory challenges because erratic performance by attorneys indicates that counsel are unable to identify prejudiced jurors accurately. Raymond J. Broderick, *Why the Peremptory Challenge Should Be Abolished*, 65 Temp. L. Rev. 369 (1992). Roger Hochman observed, in *Abolishing the Peremptory Challenge*, 17 Nova L. Rev. 1367 (1993), that "Many of the common beliefs and stereotypes prevalent among trial attorneys are simply untrue as shown by studies on jury behavior." Hochman also found that empirical studies show that lawyers are no better at predicting the way biases might be expressed in verdicts than they are in detecting bias itself.

Patricia Griffin noted in *Jumping on the Ban Wagon, supra,* that:

> The Supreme Court has in fact stated that ensuring an impartial jury is the sole purpose of the peremptory challenge. Yet supporters of retention provide no empirical evidence that peremptory challenges indeed ensure or are necessary for seating an impartial jury.

Jumping on the Ban Wagon, 81 Minn. L. Rev. 1237 (1997).

Thus, if use of the peremptory challenge does not ensure an impartial jury, the Court need not even reach the question of whether the statute is narrowly tailored to meet a compelling state interest. The statute does not meet this particular compelling state interest, regardless of how it is tailored.

Not only does the peremptory strike statute fail to meet the compelling state interest in ensuring impartial juries, it actually works affirmatively to undermine the ideal of a neutral jury composed of a fair cross-section of the community. The peremptory challenge distorts the formation of the impartial jury because it allows removal of some group beliefs that are part of the community. Kenneth J. Melilli, *Batson in Practice,* 71 Notre Dame L. Rev. 447 (1996). "Peremptories, by their very nature, systematically decrease the impartiality and representativeness of criminal juries and thus violate the Sixth Amendment." Comment *Discriminatory Use of Peremptory Challenges,* 105 Harv. L. Rev. 255 (1991).

B. Fourteenth Amendment: Equal Protection

1. The Statute Does Not Pass the Strict Scrutiny Test

The Petitioner argues that the peremptory strike statute frequently burdens fundamental rights such as freedom of association, freedom of religion, and the right to privacy of the class of peremptorily struck jurors. This argument has been best stated by Professor Liepold in a Georgetown University Law Review article:

> Denying jurors their chance to serve based on their view about gun ownership, civil rights, or Zionism plainly burdens their free speech rights; excluding jurors because they have previously filed a lawsuit denies a benefit based on a decision to petition the government; striking those who belong to liberal or conservative political groups interferes with the right of free association; removal of jurors because they are married, unmarried, or living together raises substantial concerns about interfering with privacy and family rights; and striking people because of their religion speaks for itself.

A. Liepold, *Constitutionalizing Jury Selection*, 86 Geo. L. J. 945 (1998).

When fundamental rights are burdened, the strict scrutiny test is applicable and the state is required to demonstrate that the statute furthers a compelling interest and is narrowly tailored to meet that objective. *Reno v. Flores, supra.*

As the Petitioner noted in Subsection A, *supra*, the peremptory challenge has never been proven an effective

tool for eliminating bias. Rather, the peremptory challenge may instead be the single most significant means by which racial prejudice and bias are injected into the jury selection process. Karen M. Bray, *Reaching the Final Chapter in the Story of Peremptory Challenges*, 40 U.C.L.A. Rev. 517 (1992).

Petitioner points out that there is precedent for holding that the Arkansas peremptory strike statute is unconstitutional – indeed, for holding that the peremptory strike itself is unconstitutional. In *Minetos v. City University of New York*, 925 F.Supp. 177 (S.D.N.Y. 1996), the federal district court held peremptory challenges to be *per se* unconstitutional. That court stated:

> All peremptory challenges should now be banned as an unnecessary waste of time and an obvious corruption of the judicial process. . . . It took twenty years of judicial experience with the Supreme Court's decision in *Swain v. Alabama*, for the Supreme Court to realize that its decision regarding peremptory challenges placed a "crippling burden of proof" on defendants. And while the Supreme Court has often recognized that peremptory challenges can be exercised in a manner contravening the equal protection clause of the Fourteenth Amendment, the Court has never explicitly considered whether peremptory challenges *per se* violate equal protection. This court holds that they do.
>
> It is time to put an end to this charade. We have now had enough judicial experience with the *Batson* test to know that it does not truly unmask racial discrimination.

Over twenty years ago, Justice Thurgood Marshall called for the elimination of peremptories in his concurrence to *Batson*, where he stated:

> I would go further, however [than the majority's new test to eliminate discrimination], in fashioning a remedy adequate to eliminate that discrimination [The majority's test] will not end the illegitimate use of the peremptory challenge. . . . The inherent potential of peremptory challenges to destroy the jury process by permitting the exclusion of jurors on racial grounds should ideally lead the Court to ban them entirely fr n the criminal justice system. [Cites omitted.]

In *Moore v. Oklahoma*, No. F. 90-0471, January 14, 1994, rev'd *Moore v. Oklahoma*, 900 P.2d 996 (Okla. 1995), the Oklahoma Supreme Court held peremptory challenges unconstitutional and stated:

> While the intended reason for peremptories may be to promote the state's interest in fair and impartial jurors, the statute instead invites discrimination and is *de facto* discriminatory. I am not persuaded that in criminal cases the use of peremptory challenges increases the likelihood that a less biased jury can be obtained than by the use of challenges for cause alone.

Thus, applying the strict scrutiny test as we did in our Sixth Amendment analysis in Subsection A, we conclude that striking jurors for protected activities, like striking them for race, gender, or religion, does not withstand strict scrutiny.

2. The Statute Does Not Pass the Rational Basis Test

The Petitioner further argues that the Arkansas statute cannot withstand the rational basis test. A statute will pass the rational basis test if the classification in the statute has a rational basis and is reasonably related to the purpose of the statute. *Urrey Ceramic Tile Co., Inc. v. Mosley,* 304 Ark. 711, 805 S.W.2d 54 (1991). *See* also *Gregory v. Ashcroft,* 501 U.S. 452, 111 S.Ct. 2395 (1991) and *Banker's Life v. Crenshaw,* 486 U.S. 71, 108 S.Ct. 1645 (1988). The burden is on the Petitioner to prove that the classification is not rationally related to achieving any legitimate objective of state government under any reasonable conceivable set of facts. *Reed v. Glover,* 319 Ark. 16, 889 S.W.2d 788 (1995). *See* also *Nguyen v. INS,* 2001 SL 636204 (June 11, 2001) and *Board of Trustees v. Garrett,* 531 U.S. 356, 121 S.Ct. 955 (2001).

Chief Justice Burger, in his dissent to *Batson v. Kentucky, supra,* recognized that every peremptory challenge could be objected to on the ground that it failed the rational basis test. A number of commentators have agreed. *See,* e.g., R. Broderick, *Why the Peremptory Challenge Should Be Abolished,* 65 Temp. L. Rev. 368 (1992):

> Even minimal constitutional guarantees demand that the state's proffered rationale must be more than the product of "strained imagination." Rather, the connection between the method selected and the goal to be promoted, conceivably must have some objective basis. The peremptory, however, is always employed on

> subjective grounds not amounting to an objectively persuasive determination that the targeted venire member is biased or otherwise unfit to serve as a juror. Thus, although the state's interest in securing a fair trial is undoubtedly a "substantial if not compelling one," the peremptory, by its very nature, cannot in any way advance [the end of a fair trial]. This absence of any demonstrable countervailing governmental interest furthered by the concededly arbitrary and impressionistic exercise of authority represented by the peremptory results in the inevitable conclusion that *it cannot survive any level of equal protection scrutiny, no matter how lenient.* (Emphasis added.)

The peremptory challenge "could not pass the [rational basis test], let alone strict scrutiny of equal protection analysis. Applying the Equal Protection Clause to the jury selection process in the same way the [Supreme] Court applied it to other government activities would eliminate the peremptory challenge altogether." Roger L. Hochman, *Abolishing the Peremptory Challenge,* 17 Nova L. Rev. 1367 (1993).

The peremptory challenge is not rationally related to achieving the state's objective of an impartial jury. Peremptory challenges don't work. They fail to have any impact on or correlation to ensuring the selection of an impartial jury. Furthermore, they operate as method by which parties can continue to discriminate against potential jurors on the basis of religion, race, free speech, and other constitutionally protected statuses or activities.

C. The Impossibility of Proving Prejudicial Impact

The Arkansas Supreme Court held that it would not address the merits of the constitutional challenge to the peremptory strike statute because the appellant did not demonstrate at trial that the statute had a prejudicial impact on him or on a stricken juror. The Court, however, never addressed the problem of how a defendant would ever be able to demonstrate prejudice.

In small towns in Arkansas, prosecutors know many members of a jury pool by name and face, especially if panel members have appeared for other trials during the same term of jury service. Often, a prosecutor knows whether venirepersons are, for example, Jewish, gay, Republican, Democrat, married, childless, union members, ACLU members, churchgoers, drinkers, Jehovah's Witnesses, university professors, farmers, chicken catchers, bankers, police officers, or wife beaters. If a prosecutor wishes to exercise a peremptory strike, he can do so, as long as he thinks up an acceptable reason for doing so – regardless of his real motive for striking the juror. A prosecutor is not going to tip his hand by asking the panel questions directly related to the real reason that he will use his peremptory strike, so there is no record to show the real, improper reason.

The defense attorney may never even know there *is* a *Batson* issue, so how can he or she protect the defendant or the juror? Further, in Arkansas, attorneys don't get to poll prosecutors or stricken jurors about any beliefs, habits, or anything else that might have been the real, underlying reason that a prosecutor struck that juror

from the panel – so, again, the defense attorney has no way to prove that the prosecutor exercised a strike in a discriminatory manner.

Finally, peremptory strikes should be completely abolished because they have turned thousands of jury trials into *Batson* hearings. Any computer search of cases involving the interpretation of *Batson* will unearth many thousands of opinions from appellate judges who have had to address *Batson* issues. *Batson* hearings are a waste of judicial resources; *Batson* is simply no longer a useful or judicially feasible tool for ensuring a fair and impartial jury.

III. CONCLUSION: THE PEREMPTORY CHALLENGE IS UNCONSTITUTIONAL

The Supreme Court should take this timely opportunity to review its previous decisions and hold that the Arkansas peremptory strike statute, and, indeed, all peremptory challenges, are unconstitutional, because the peremptory challenge violates the criminal defendant's Sixth and Fourteenth Amendment rights to a fair and impartial jury, composed of a cross-section of the community, because the peremptory challenge violates a potential juror's Fourteenth Amendment right to equal

protection of our laws, and because the *Batson* rules have far outlived their intended usefulness.

Respectfully submitted,

STEVEN SCOTT BADER,
Petitioner

DOUG NORWOOD
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Rogers, AR 72757-2044
(501) 636-1262
Ark. Bar No. 87097

Supreme Court of Arkansas.

Steven Scott BADER

v.

STATE of Arkansas.

No. CR 00-565.

March 22, 2001.

Brad Karren, Bentonville and Doug Norwood, Rogers, for appellant.

Mark Pryor, Att'y Gen., by Leslie Fisken, Ass't Att'y Gen., for appellee.

RAY THORNTON, Justice.

Appellant, Steven Scott Bader, appeals the judgment of the Benton County Circuit Court, convicting him of murder in the first degree and sentencing him to forty years' imprisonment in the Arkansas Department of Correction. Appellant raises three points for reversal: (1) the trial court erred in not allowing inquiry of the jury panel as to their religious denomination and the number of times that they attended a religious service each month, (2) the trial court erred in failing to find the Arkansas peremptory challenge statute, Ark.Code Ann. § 16-33-305 (Repl.1999), facially unconstitutional, and (3) the trial court erred by not making an on-the-record determination of appellant's waiver of his right to testify. We find no error and affirm.

Appellant does not challenge the sufficiency of the evidence supporting his conviction. The evidence showed that he broke into the home of seventy-two-year-old Robert Sikes ("Sikes") on April 12, 1998, and beat him severely. The victim was hospitalized until his death on

May 9, 1998. After Sikes's death, the State charged appellant and Diana Martens with murder in the first degree.

At a pretrial hearing on September 14, 1999, appellant notified the court that he wanted to submit a jury questionnaire pertaining to religion to the prospective jurors. The trial court declined to address appellant's intention to submit these questions because it thought the questions could be asked within the constraints of *voir dire*. Appellant then notified the trial court that he wished to strike prospective jurors based solely on their religious affiliation. The trial court responded to this argument by notifying appellant's counsel that he must provide legal authority in order to strike prospective jurors because of their religious beliefs.

Prior to jury selection on September 20, 1999, appellant again requested that the court permit him to strike jurors based on their religious beliefs. Appellant specifically requested that he be permitted to ask certain questions of the prospective jurors as to their (1) general religious classifications, such as whether they are Christian, Jewish, Muslim, Buddhist, or any of the other major religions, (2) denominational affiliations under those general religious classifications, such as whether they are Church of Christ, Lutheran, Presbyterian, etc., and (3) how many times in the average month that they attend any kind of religious services. Appellant stated that he should be permitted to use peremptory challenges to strike jurors based on religion because of the provisions of the First, Sixth, and Fourteenth Amendments to the United States Constitution. He further contended that the United States Supreme Court has not extended *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986)

and *J.E.B. v. Alabama*, 511 U.S. 127, 114 S.Ct. 1419, 128 L.Ed.2d 89 (1994) to include any classifications other than race and gender. The trial court ruled that the proposed questions relating to religious affiliation or practice could not be asked because they would violate the Arkansas Civil Rights Act of 1993, as codified at Ark.Code Ann. §§ 16-123-101 – 16-123-210 (Supp.1999), or, more specifically, Ark.Code Ann. §§ 16-123-102(8) (Supp.1999) & 16-123-107(a) (Supp.1999). The trial court went on to state the following:

> And so you will not be allowed to utilize a peremptory challenge strictly on the basis of religion . . . but that does not in any way prohibit you from inquiring, either side, from inquiring as to whether anyone possesses religious beliefs or convictions or philosophical ideas so strong that they would interfere with their ability to follow the [c]ourt's instructions, follow the law and objectively consider the evidence and rule as the evidence dictates.

Appellant had also filed a pretrial motion on September 16, 1999, asking the trial court to disallow all peremptory strikes and to hold the Arkansas peremptory challenge statute, Ark.Code Ann. § 16-33-305, unconstitutional on the grounds that the statute allows both sides to strike jurors for unlawful reasons. At the pretrial status hearing on September 17, 1999, the trial court denied appellant's motion, finding that peremptory challenges have been historically accepted in Arkansas and every state in the United States. The trial court noted that safeguards against unlawful peremptory challenges were established in *Batson v. Kentucky, supra*. The trial court further stated the following: "[T]he safeguards that have

been put in place, the *Batson* rule and analysis to avoid discrimination . . . ha[ve] later been extended as much as possible to cover gender discrimination, I think those are sufficient safeguards and clear up . . . to some extent the abuses you are talking about."

Following the trial court's ruling that *voir dire* examination of jurors would be limited to inquiry as to whether any of the jurors possessed religious beliefs, convictions, or philosophical ideas so strong that they would interfere with their ability to follow the court's instructions, follow the law, and objectively consider the evidence and rule as the evidence dictates, the State used four, and appellant used seven, peremptory strikes to eliminate jurors. There is no indication in the briefs that any of these strikes were used for any particular reason. In addition, no jurors were stricken for cause. Finally, there is no indication in the briefs that either appellant's counsel or the prosecution objected to the make-up of the jury.

I. The trial court did not abuse its discretion by limiting voir dire.

For his first argument on appeal, appellant contends that the trial court erred in not allowing inquiry of the jury panel on *voir dire* as to their religious classification, denomination, and number of times that they attend a religious service each month. Appellant asserts that the trial court's ruling restricting his *voir dire* in this manner constituted reversible error. We disagree.

We have held that the extent and scope of *voir dire* is left to the sound discretion of the trial court and that the

trial court's ruling will not be disturbed on appeal, absent an abuse of discretion. *E.g., Britt v. State*, 334 Ark. 142, 974 S.W.2d 436 (1998) (citing *Ferrell v. State*, 325 Ark. 455, 929 S.W.2d 697 (1996)). For example, in *Henry v. State*, 309 Ark. 1, 828 S.W.2d 346 (1992), we held that there is no abuse of discretion when the trial court curtails protracted *voir dire* examination, or restricts questions that do not touch upon the qualifications of venirepersons to serve as impartial jurors, or that are potentially confusing to the prospective jurors. In addition, when we have upheld *voir dire* limitations, we have held that we do not find the questions so plainly appropriate that we are prepared to say the trial court's discretion was abused. *Roderick v. State*, 288 Ark. 360, 705 S.W.2d 433 (1986) (citing *Sanders v. State*, 278 Ark. 420, 646 S.W.2d 14 (1983)).

In this case, the questions regarding religious preferences that appellant was seeking to ask were not so plainly appropriate that we should say the trial court's discretion was abused. While the desired questions were not submitted by written proffer, the abstract shows that appellant was seeking specific information concerning each juror's (1) general religious classifications, such as whether they are Christian, Jewish, Muslim, Buddhist, or any other of the major religions, (2) denominational affiliations under those general religious classifications, such as whether they are Church of Christ, Lutheran, Presbyterian, etc., and (3) how many times in the average month the venireperson attends any kind of religious service. The purpose of the proposed *voir dire* was, according to appellant's brief, to use peremptory strikes to remove venirepersons that appellant considered to be too religious.

We note that there are prohibitions against using religious tests as a qualification for holding office, voting, or exercising the rights of a citizen to participate fully in the instrumentalities of government. The principles of religious freedom and the prohibition against religious discrimination are well-grounded in this country. The United States Constitution states that "no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States." U.S. Const. art. 6. This principle is similarly articulated in Article II, Section 26, of the Arkansas Constitution, which provides that "[n]o religious test shall ever be required of any person as a qualification to vote or hold office, nor shall any person be rendered incompetent to be a witness on account of his religious belief; but nothing herein shall be construed to dispense with oaths or affirmations." *Id.*

The principle that there is a prohibition against discrimination based on religious beliefs existed long before the *Batson* decision was handed down in 1986, and, indeed, existed long before Arkansas adopted the Arkansas Civil Rights Act of 1993,[1] the statute upon

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[1] The particular statutes the trial court invoked were Ark.Code Ann. § 16-123-102(8) and Ark.Code Ann. § 16-123-107(a). Ark.Code Ann. § 16-123-102(8) provides, in relevant part:

For the purposes of this subchapter:

(8) "Religion" means all aspects of religious belief, observance, and practice.

Id. Ark.Code Ann. § 16-123-107(a) provides, in relevant part:

(a) The right of an otherwise qualified person to be free from discrimination because of race, religion, national origin, gender, or the presence of any sensory, mental, or physical disability is

which the trial court relied. The principle is well established that a trial court does not abuse its discretion in limiting the scope of *voir dire* examinations to questions addressing whether the venireperson would be qualified to serve as an impartial juror. *Henry, supra.* Here the trial court permitted an alternative line of questioning that was designed to educe information as to whether the venireperson had personal religious beliefs, convictions, or philosophical ideas that would impair his ability to serve as an impartial venireperson, and we note that appellant did not choose to inquire using the permitted alternative line of questioning. We conclude that trial court did not abuse its discretion in limiting the scope of the *voir dire* examination in this case to questions addressing whether the venireperson's personal religious beliefs, convictions, or philosophical ideas would prevent the venireperson from following the law upon the instructions of the court. The trial court clearly did not interpret Ark.Code Ann. §§ 16-123-102(8) and 16-123-107(a) as

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recognized as and declared to be a civil right. This right shall include, but not be limited to:

(1) The right to obtain and hold employment without discrimination;

(2) The right to the full enjoyment of any of the accommodations, advantages, facilities, or privileges of any place of public resort, accommodation, assemblage, or amusement; (3) The right to engage in property transactions without discrimination;

(4) The right to engage in credit and other contractual transactions without discrimination; and

(5) The right to vote and participate fully in the political process.

Id.

preventing any general inquiry as to the ability of venirepersons to follow the law.

We conclude that the trial court's limitation on questions regarding religious beliefs was not an abuse of discretion. The trial court was well within its discretion in limiting appellant's use of religious questions that would range far beyond those needed to evaluate the qualifications of venirepersons to serve as impartial jurors. Certainly appellant's proposed questions were not "plainly appropriate" under *Roderick, supra.* Accordingly, the trial court's ruling is affirmed.

II. Appellant is barred from challenging the constitutionality of the peremptory statute because he did not demonstrate prejudice.

For his second assignment of error, appellant argues that the trial court erred in failing to find that the Arkansas peremptory challenge statute, Ark.Code Ann. § 16-33-305, is unconstitutional. Specifically, appellant argues that the Arkansas peremptory challenge statute violates the Sixth Amendment right to an impartial jury and fair cross-section of the community and, alternatively, the Fourteenth Amendment right to equal protection.

It is well settled that in order to have standing to challenge the constitutionality of a statute, a person must show that the challenged statute had a prejudicial impact on him. *E.g., Brooks v. State,* 328 Ark. 32, 941 S.W.2d 409 (1997); *Garrigus v. State,* 321 Ark. 222, 901 S.W.2d 12 (1995).

For example, in *Brooks, supra,* we held that appellant did not have standing to challenge the constitutionality of Ark.Code Ann. § 16-97-103 (Supp.1999) because he could not demonstrate a prejudicial impact from the application of that statute, which provides for victim-impact evidence to be admissible during the sentencing phase of bifurcated trials, because the State did not introduce any victim-impact evidence.

Similarly, in *Garrigus, supra,* we held that appellant did not have standing to challenge the constitutionality of Ark.Code Ann. § 5-65-310 (Repl.1997, Supp.1999) because he could not demonstrate a prejudicial impact from the application of that statute, which prescribes various penalties for the refusal of an underage person arrested for DUI to submit to a chemical test based on whether the arrestee is a resident or nonresident of the state and whether he has a valid driver's license, because he voluntarily submitted to a breathalyzer, and, thus, there was no finding that he violated the statute.

Appellant did not demonstrate how the application of the peremptory-strike statute had a prejudicial impact upon appellant or upon any juror in the case. Indeed, there is no indication in the briefs of the reasons why either appellant or the State struck jurors. Because appellant did not demonstrate that the peremptory challenge statute had a prejudicial impact on either him or on any stricken juror, it thus follows that appellant lacks standing to raise the issue on appeal and we decline to reach the merits of the constitutional challenge.

III. Appellant failed to preserve for review his argument that the trial court erred by not determining whether he waived his right to testify.

For his third argument on appeal, appellant asserts for the first time that the trial court erred by not determining through an on-the-record colloquy as to whether appellant knowingly and voluntarily waived his right to testify. We note from the abstract that appellant did not seek to testify. Because appellant did not make his argument that he had not waived his right to testify to the trial court, we do not reach it here.

Our contemporaneous-objection rule requires objection at the trial level in order to preserve an argument for appeal. *Smith v. State*, 310 Ark. 30, 832 S.W.2d 497 (1992); *Miller v. State*, 309 Ark. 117, 827 S.W.2d 149 (1992). We have also consistently held that the contemporaneous-objection rule applies, even with respect to the denial of constitutional rights. *Moore v. State*, 303 Ark. 514, 798 S.W.2d 87 (1990); *Smith v. State*, 296 Ark. 451, 757 S.W.2d 554 (1988).

In making the argument that he is not barred from raising this issue on appeal, appellant relies on *Calnan v. State*, 310 Ark. 744, 841 S.W.2d 593 (1992) as authority for the proposition that the contemporaneous objection rule does not apply in this case. In *Calnan, supra*, we outlined four exceptions to the contemporaneous-objection rule.[2] In *Calnan, supra*, we applied the exception that there is no

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[2] These four exceptions are usually referred to as the *Wicks* exceptions because they were first outlined in *Wicks v. State*, 270 Ark. 781, 606 S.W.2d 366 (1980).

need for there to have been a contemporaneous objection at the trial level in order to raise an issue on appeal if a serious error will otherwise result. *Id.* Appellant relies on this exception as being applicable to the present case. However, appellant's reliance on this case is misplaced.

While it is true that *Calnan* applied the *Wicks* exception under *Wicks v. State*, 270 Ark. 781, 606 S.W.2d 366 (1980) that there is no need for a contemporaneous objection to raise an issue on appeal if a serious error will otherwise result, *Calnan* is clearly distinguishable from the present case. *Calnan* involved a different issue than the present case, namely the denial of the right to jury trial. In *Calnan, supra,* appellant was tried in municipal court and found guilty of DWI, disorderly conduct, violation of the implied-consent law, and speeding. *Id.* She appealed to the circuit court and was found guilty of all charges but speeding in a *de novo* bench trial. *Id.* This conviction by a bench trial had the effect of depriving Calnan of her right to a jury trial. *Id.* The appellant in *Calnan, supra,* claimed that she did not waive her right to a trial by jury, whereas in the case before us, appellant does not contend that he did not waive his right to testify, but, rather, argues that his waiver was not documented through a colloquy on the record. Therefore, *Calnan* is not applicable to the present case for the proposition for which appellant asserts it.

Appellant did not make a contemporaneous objection at trial as to the issue of appellant's waiver of the right to testify. Accordingly, we are precluded from addressing this argument on appeal.

The judgment of conviction is affirmed.

GLAZE, J., concurs.

TOM GLAZE, Justice, concurring.

Regarding Point I of the majority opinion, I concur and do so on the sole basis that the trial court permitted appellant Steven Bader an alternative line of questioning that was designed to educe information as to whether the venireperson had personal religious beliefs, convictions, or philosophical ideas that would impair his or her ability to serve impartially. Bader chose not to pursue such questioning. This court has held that the trial court's "limited restriction" on voir dire does not constitute an abuse of discretion. *See Ward v. State,* 308 Ark. 415, 827 S.W.2d 110 (1992).

Here, the trial court determined that specific information about denomination and church attendance was irrelevant for Bader to determine whether the potential jurors' religious beliefs would prohibit them from following the law. Only when proposed questions are "plainly appropriate" will this court conclude that the trial court abused its discretion by restricting voir dire. Mr. Bader failed to show how his proposed questions were plainly appropriate in the circumstances; thus, it cannot be said that the trial court abused its discretion in restricting his voir dire and by allowing Bader to offer a reasonable alternative line of questions.

IN THE CIRCUIT COURT OF
BENTON COUNTY, ARKANSAS

STATE OF ARKANSAS PLAINTIFF

V. No. CR-98-440-2

STEVEN SCOTT BADER DEFENDANT

VOLUME III OF VII VOLUMES

APPEAL TRANSCRIPT

(Filed May 13, 2000)

* * *

[546] beneficial to his client and that he wants in.

THE COURT: All right, I am thankful I didn't read those cases. All right, for right now that issue is moot and we will address it should it arise.

Let's go to – now that leaves then Mr. Norwood and Mr. Karren's motion for a continuance.

MR. NORWOOD: I have another motion, the one on the peremptory challenges.

THE COURT: Yes.

MR. NORWOOD: I didn't know if you wanted to do that later or you wanted to do that now.

THE COURT: All right, go ahead.

MR. NORWOOD: I filed a brief.

THE COURT: I read your – the one you want to abuse.

MR. NORWOOD: This is the one where I want – we have a state peremptory challenge statute. It's

16-33-305. I filed basically just a motion to have it declared unconstitutional citing the Court to a fairly recent New York case. I don't know if you got a copy of that or whatever.

THE COURT: Go ahead. I don't have a copy of the New York case, but I will listen to your summarization of it.

[547] MR. NORWOOD: Okay. There's only one case in the entire country that I can find on WestLaw that has done this and that was a federal district court case that was not appealed to the federal circuit level, and it was a lawsuit, a civil lawsuit against some person named Minetos against the City University of New York. And the judge, the federal judge ruled that there had been discrimination in the selection of the jury by both sides and then went on to rule that the use of peremptory strikes are per se unconstitutional because they allow both sides to strike people based upon illegal reasons which is, I mean, the standard list currently is race, gender, and as a general rule those are the two, and then some courts have extended it to religion and then it is still up in the air on sex, sexual orientation and age. So my position is that neither side, neither the defendant or the State, should be able to strike anybody under the peremptory statute, peremptory strikes statute, I get a certain number, they get a certain number and rule it facially unconstitutional. The one case is the only case in the county like that.

THE COURT: Your motion is overruled. I find that the peremptory challenges have been [548] historically accepted in this state and every state in the union. I

think it is significant that the only state you can cite is some obscure federal district court in New York that wasn't appealed so there is no any real precedent for that.

The, uh, I think that the safeguards that have been put in place, the *Batson* rule and analysis to avoid racial discrimination, it has later been extended as much as possible to cover gender discrimination, I think those are sufficient safeguards and clear up any – clear up to some extent the abuses you are talking about.

Mr. Norwood, I – just as an aside, you haven't mentioned strikes for cause. I guess that is next on your list because anybody that has tried very many jury trials knows that there is oftentimes an attempt by either side to utilize strikes for cause to accomplish some of the same things they try to accomplish with their peremptory strikes. In fact, oftentimes in high profile cases the lawyers have exhausted themselves trying to get the judge to accept their reasoning that is sometimes, uh, in which they are disguising ulterior motives, strike the same people for cause they ultimately use their peremptory strikes for. So I don't think that your [549] motion to do away with peremptory strikes would be a cure all and I really think that there are some safeguards in place that are difficult of course to, uh, difficult to go into the minds of the attorneys and prevent them from using whatever means are at their disposal to shape the jury into a form that they think best suits their, uh, is most receptive to their side of the case. But in any event, I am – I overrule your motion.

Now, let's go to your motion for a continuance. Do you wish to speak in its behalf?

MR. NORWOOD: I need to attach, Your Honor, Exhibit E to that motion, and I will have to file it in the clerk's office.

MR. BUTLER: I have seen it, Your Honor. I don't have any objection. I brought the same article for the Court today.

THE COURT: All right, Exhibit E is admitted as part of –

MR. NORWOOD: Your Honor, that was in the *Benton County Daily Record* this morning.

THE COURT: All right, it will be considered as an attachment to your Motion For A Continuance and you may proceed.

MR. NORWOOD: Well, Your Honor, whenever we had

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IN THE CIRCUIT COURT OF
BENTON COUNTY, ARKANSAS
19TH JUDICIAL DISTRICT, 2ND DIVISION

STATE OF ARKANSAS PLAINTIFF

vs. CR-98-440-2(A)
CR 95-146-1
CR 90-549-2

STEVEN SCOTT BADER DEFENDANT

JUDGMENT AND COMMITMENT ORDER

(Filed Oct. 15, 1999)

NOW on this 22rd day of September, 1999, this cause coming on to be heard, the State of Arkansas appearing by Prosecuting Attorney, Brad Butler and Deputy Prosecuting Attorney, Robert Balfe and the defendant, Steven Scott Bader, appearing in person and by his attorneys, Doug Norwood and Brad Karren, and the Defendant having been previously arraigned and entered his plea of NOT GUILTY to the charge of Murder in the First Degree (§5-10-102). All parties announced ready for trial on the 20th day of September, 1999, and a jury of twelve from the regular panel of petit jurors were impaneled and sworn to try the cause, and, having heard the evidence, the instructions of the Court, and the arguments of counsel, retired to consider its verdict. The trial having lasted three (3) days, the Jury, returned into Court verdicts of GUILTY on the charge of Murder in the First Degree, Class Y Felony (§5-10-102). After pronouncement of the verdict, the jury again retired to determine the sentence recommendation which the Court accepted and followed.

IT IS THEREFORE, CONSIDERED, ORDERED AND ADJUDGED BY THE COURT that the defendant, Steven Scott Bader, is guilty of Murder in the First Degree, Class Y Felony (§5-10-102) and sentenced to confinement in the Arkansas Department of Correction for forty (40) years with credit for five hundred (500) days in custody before sentencing.

The Court made the following findings:

DEFENDANT'S FULL NAME: Steven Scott Bader
AKA:
DATE OF BIRTH: 5/30/64 RACE: Cau SEX: Male
ARREST TRACKING #: 4708154 SID#: 1300005854
DEFENDANT'S ATTORNEY: Doug Norwood/Brad Karren
PROSECUTING ATTORNEY OR DEPUTY:
Brad Butler/Robert Balfe
CHANGE OF VENUE FROM:
Defendant was represented by: Appointed Counsel

Defendant made a voluntary, knowing and intelligent waiver of the right to counsel: no

There being no legal cause shown by the Defendant, as requested, why judgment should not be pronounced, a judgment of conviction is hereby entered against the Defendant on each charge enumerated below, fines levied, and court costs assessed.

The Defendant is sentenced to the Arkansas Department of Correction (A.D.O.C.) for the term specified on each offense shown below:

NUMBER OF OFFENSES: FOUR

Offense # One

A.C.A. # of Offense: §5-10-102
Name of Offense: Murder in the First Degree
Seriousness Level of Offense: N/A – JURY TRIAL
Criminal History Score: N/A – JURY TRIAL
Presumptive Sentence: N/A – JURY TRIAL
Sentence is a departure from the sentencing grid: N/A – JURY TRIAL
Offense is a: Felony
Classification of offense: Class Y
Sentence imposed: Four Hundred, eighty (480) months
Suspended imposition of sentence: Zero (0) months
Defendant was sentenced as a Habitual Offender under A.C.A. 5-4-501, Subsection A,B,C or D: Yes
Sentence was enhanced by A.C.A. no
Defendant (attempted/solicited/conspired) to commit the offense: n/a
Offense Date: 4/12/98 and 4/13/98
Docket #: CR 98-440-2(A)
Number of counts: One (Count 1)
Defendant was on (probation/parole) at the time of conviction: Probation
Commitment on this offense is a result of the revocation of Defendant's probation or suspended imposition of sentence: no
Defendant is a Child Sex Offender as defined in A.C.A. 12-12-902: No
Victim of the offense was (under/over) the age of eighteen: under the age of eighteen.

Defendant voluntarily, intelligently, and knowingly entered a: NOT GUILTY plea;
Defendant was found guilty by Jury Trial of September 20, 1999, through September 22, 1999. Sentencing was pronounced September 22, 1999.

Offense # Two

A.C.A. # of Offense: §5-64-403
Name of Offense: Possession of Drug Paraphernalia
Seriousness Level of Offense:
Criminal History Score:
Presumptive Sentence:
Sentence is a departure from the sentencing grid:
Offense is a: Felony
Classification of offense: Class C
Sentence imposed: One hundred, eight (108) months
Suspended imposition of sentence: Zero (0) months
Defendant was sentenced as a Habitual Offender under A.C.A. 5-4-501, Subsection A,B,C or D: Yes
Sentence was enhanced by A.C.A.
Defendant (attempted/solicited/conspired) to commit the offense: n/a
Offense Date: on or about 11/14/90
(Tracking No. 59288)
Docket #: CR 90-549-2
Number of counts: One (Count 1)
Defendant was on (probation/parole) at the time of conviction: Probation
Commitment on this offense is a result of the revocation of Defendant's probation or suspended imposition of sentence: Yes

Defendant is a Child Sex Offender as defined in A.C.A. 12-12-902: No
Victim of the offense was (under/over) the age of eighteen: under the age of eighteen.
Defendant voluntarily, intelligently, and knowingly entered a negotiated plea of guilty.

Offense # Three

A.C.A. # of Offense: §5-64-403
Name of Offense: Possession Drug Paraphernalia
Seriousness Level of Offense:
Criminal History Score:
Presumptive Sentence:
Sentence is a departure from the sentencing grid:
Offense is a: Felony
Classification of offense: Class C
Sentence imposed: One Hundred, Twenty (120) months
Suspended imposition of sentence: Zero (0) months
Defendant was sentenced as a Habitual Offender under A.C.A. 5-4-501, Subsection A,B,C or D: Yes
Sentence was enhanced by A.C.A. no
Defendant (attempted/solicited/conspired) to commit the offense: n/a
Offense Date: 1/30/95
Docket #: CR 95-146-1
Number of counts: One (Count 1)
Defendant was on (probation/parole) at the time of conviction: Probation
Commitment on this offense is a result of the revocation of Defendant's probation or suspended imposition of sentence: Yes

Defendant is a Child Sex Offender as defined in A.C.A. 12-12-902: No

Victim of the offense was (under/over) the age of eighteen: under the age of eighteen.

Defendant voluntarily, intelligently, and knowingly entered a negotiated plea of guilty.

Offense # Four

A.C.A. # of Offense: §5-64-401

Name of Offense: Possession Controlled Substance (Marijuana)

Seriousness Level of Offense:

Criminal History Score:

Presumptive Sentence:

Sentence is a departure from the sentencing grid:

Offense is a: Felony

Classification of offense: Class D

Sentence imposed: Seventy-two (72) months

Suspended imposition of sentence: Zero (0) months

Defendant was sentenced as a Habitual Offender under A.C.A. 5-4-501, Subsection A,B,C or D: Yes

Sentence was enhanced by A.C.A. no

Defendant (attempted/solicited/conspired) to commit the offense: n/a

Offense Date: 1/30/95

Docket #: CR 95-146-1

Number of counts: One (Count 2)

Defendant was on (probation/parole) at the time of conviction: Probation

Commitment on this offense is a result of the revocation of Defendant's probation or suspended imposition of sentence: YES

Defendant is a Child Sex Offender as defined in A.C.A. 12-12-902: No

Victim of the offense was (under/over) the age of eighteen: under the age of eighteen.

Defendant voluntarily, intelligently, and knowingly entered a negotiated plea of guilty.

Indicate which sentences are to run consecutively: Revocations to run concurrently with each other and consecutively with Offense Number One (Murder in the First Degree)

Death Penalty: Execution date:

Total time to serve on all offenses listed above: Six hundred (600) months

Time is to be served at: Arkansas Department of Correction

Jail time credit: Five Hundred (500) days

The Defendant was convicted of a target offense under the Community Punishment Act. The Court hereby orders that the Defendant be judicially transferred to the Department of Community Punishment (D.C.P.) NO Defendant to complete all programs at D.C.P. Failure to meet the criteria or violation of the rules of the D.C.P. could result in transfer to the A.D.O.C.

Defendant is to pay: N/A

Payable as follows: N/A

Payments are to be made to: Benton County Circuit Clerk, Benton County Courthouse, 102 Northeast "A" Street, Bentonville, AR 72712

Defendant is a Child Sex Offender as defined in A.C.A. 12-12-902: no

Defendant was informed of the right to appeal: YES in Open Court on September 22, 1999.

Appeal Bond: n/a

The County Sheriff is hereby ordered to transport the Defendant to: ADOC

The short report of circumstances attached hereto is approved.

Date: September 22, 1999 Circuit Judge: David S. Clinger

Signature: /s/ David S. Clinger

I certify this is a true and correct record of this Court.

Date: 10-15-99 Circuit Clerk/Deputy /s/ Faye Taylor
Judge: Clinger
Date 9/22/99 Div 2
Jury Trial [X]
Bench Trial [ ]
Non-Trial [ ]

IN THE CIRCUIT COURT OF BENTON COUNTY
BENTONVILLE, ARKANSAS

STATE OF ARKANSAS PLAINTIFF

V. No. CR-98-440-2

STEVE BADER DEFENDANT

DEFENSE MOTION TO HAVE A.C.A. 16-33-305 DECLARED UNCONSTITUTIONAL

Comes now the defendant and for his motion doth state and allege as follows:

1. Arkansas Statue No. 16-33-305 should be declared unconstitutional pursuant to the Federal 6th & 14th Amendments to the United States Constitution, as well as Arkansas Constitution Art. 2. Sec. 8, 9 & 10. Peremptory challenges allow for discrimination by all parties based upon the jurors race, creed, sex, sexual orientation, age, association, and religious beliefs and practices. This practice is a relic of history and should be declared illegal.

2. The legal authority supporting this motion is *Minetos v. City University of New York*, 925 F. Supp. 177 (S.D.N.Y. 1996).

RESPECTFULLY SUBMITTED

STEVE BADER

BY: /s/ Doug Norwood
Doug Norwood
Norwood & Norwood, P.A.
P.O. Box 2044
Rogers, AR 72757

CERTIFICATE OF SERVICE

I have this date, September 15, 1999, personally delivered a copy of this pleading to the Benton County Prosecuting Attorney's Office, Benton County Courthouse, Bentonville, Arkansas.

/s/ Doug Norwood
Doug Norwood
September 16, 1999